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No. 91-1273

In The

Supreme Court of the United States

October Term, 1991

DOCTOR NUI LOA PRICE, *et al.*,

Petitioners,

vs.

STATE OF HAWAII, *et al.*,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

STATE RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Ninth Circuit properly affirmed the District Court's dismissal of claims of "breach of trust" against the State of Hawaii and its officials, sued in their official capacities, on the basis that those claims sought payment from the State fisc of an "accrued liability" and therefore were barred by the Eleventh Amendment.

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The State of Hawaii, and William W. Paty, Chairman of the Board of Land and Natural Resources of the State of Hawaii, Herbert K. Apaka, Jr., Moses W. Kealoha, J. Douglas Ing, John Arisumi, and Herbert Arata, members of the Board of Land and Natural Resources of the State of Hawaii, together with their successors in office, and Jown Waihee, Governor of Hawaii, pray that the petition for certiorari in No. 91-1273 be denied.

This petition is related to that in No. 91-1238, and we respectfully incorporate herein the Petition in that docket

as setting forth the general background of the litigation in this docket. To that Petition we add as follows.

STATEMENT OF THE CASE

The petition in No. 91-1273 arises out of the Ninth Circuit's straightforward application of settled Eleventh Amendment principles to Petitioners' claims for payment of "a one time restoration of the [alleged] lost corpus" of land belonging to the Honolulu Sailors' Home Society. *See Papasan v. Allain*, 478 U.S. 265, 281 (1986). *Papasan* was correctly invoked against a breach of trust claim arising out of the administration of Hawaii's public trust lands in *Ulaleo v. Paty*, 902 F.2d 1395 (9th Cir. 1990), and was similarly applied correctly in this case, where Petitioners challenged the State's refusal to take measures to seize the Sailors' Home parcel in the face of three state circuit court judgments that conclusively determined, as between the Attorney General, as representative of the public, and the Sailors' Home Society, that the Society's actions were consistent with the original grant of land to the Society by the Republic of Hawaii. *See* Pet. App. 3a and appendix "F" to the Petition in No. 91-1238.

Although Petitioners advanced a variety of arguments in the Ninth Circuit as grounds why the Eleventh Amendment was not in play, Petitioners had made no good record in the District Court on this issue. Indeed, Plaintiffs' opposition to the State Respondents' motion to dismiss was not even filed until November 27, 1989, eleven days after the due date in the District Court under District of Hawaii Local Rule 220. Thus, the Ninth Circuit

did not address any of Petitioners' arguments in detail, and disposed of the case with a summary reference to its decision in *Ulaleo v. Paty*, 902 F.2d 1395 (9th Cir. 1990), *supra*. *See generally* Pet. App. 6a-7a.

REASONS FOR DENYING THE WRIT IN NO. 91-1273

The petition in No. 91-1273 is a plainly meritless effort to overturn Eleventh Amendment principles which have repeatedly been affirmed by strong majorities of this Court. Even if a substantial Eleventh Amendment issue were presented, however, alternative bases for the judgment warrant the writ's denial.

I. The Petition Does Not Raise Any Substantial Question as to the Application of the Eleventh Amendment to Claims for Breach of Trust Arising out of Federal Land Grants.

Petitioners frankly concede that their Petition depends on this Court's overruling *Hans v. Louisiana*, 134 U.S. 1 (1890), but this Court has consistently refused to do so. *See, e.g., Dellmuth v. Muth*, 491 U.S. 223, 229 n.2 (1989); *Welch v. Department of Highways*, 483 U.S. 468, 494 & n.27 (1983). This case presents none of the attributes this Court has advanced as possible grounds for reconsideration of established precedent. Petitioners, for example, present no independent argument that *Hans* misunderstood the purpose or history of the Eleventh Amendment, or prior cases construing the amendment, or that overruling *Hans* is necessary to make application of the Eleventh Amendment workable in light of present-day conditions. Indeed,

this case, as does *Papasan v. Allain*, 478 U.S. 265 (1986), on which the Ninth Circuit's decision goes off, makes clear the necessity for immunity, for this case plainly raises no issue of structural wrongdoing of the type this Court has properly described as "prospective" and thus meriting application of the exception set forth in *Ex parte Young*, 209 U.S. 123 (1908).

The Ninth Circuit properly applied *Papasan v. Allain*, 478 U.S. 265 (1986), which rejected "breach of trust" claims made in connection with Mississippi's alleged waste of the Chickasaw Cession Lieu Lands. There, as here, the petitioners were held barred by the Eleventh Amendment "[e]ven if the petitioners here were seeking only the payment of an amount equal to the income from the lost corpus," as "such payment would be merely a substitute for the return of the trust corpus itself." *Id.* at 281. If the State of Hawaii improperly failed to "recover" the Sailors' Home Society parcel, any official capacity claims against the State are logically barred under the *Papasan* case.

Petitioner's suggestion that Congress waived Hawaii's immunity when it enacted Section 5(f) of the Admission Act (*see* Pet. at 7), is sheer nonsense. To accept such argument would be tantamount to holding that, with respect to lands conferred at Statehood, every State admitted after the formation of the Union had no immunity from suit to enforce federal conditions imposed upon the land. Moreover, in this case the argument is particularly inapt, since Congress specified only a suit "by the United States" as the exclusive remedy for trust breaches. *See* 73 Stat. at 6. Even if the Equal Footing Doctrine does not imply as much as the Petitioners assert in No.

91-1238, a point we do not concede, clearly "the strong presumption . . . against finding an intent to defeat the State's title" could not mean as little as the Petitioners in this case urge. *See Utah Division of State Lands v. United States*, 482 U.S. 193, 201 (1987). The short answer to any "waiver" argument is that Congress did not in any way, let alone sufficiently, suggest it was waiving Eleventh Amendment immunity when it passed the Admission Act. *See Dellmuth v. Muth*, 491 U.S. at 228 (in assessing waiver arguments such as those here, "we have applied a simple but stringent test: 'Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.' ").

The notion that the "co-plaintiff" doctrine could be used to undermine Hawaii's immunity in this particularly sensitive context (Pet. at 21) has no substance to it. *See Blatchford v. Native Village of Noatak*, 111 S. Ct. 2578, 2584 (1991) ("even consent to suit by the United States for a particular person's benefit is not consent to suit by that person himself").

There is no basis for review of the judgment adverse to the Petitioners in No. 91-1273.

II. Even if the Petition Presented a Substantial Eleventh Amendment Issue, the Judgment is Independently Supported.

Even if the judgment below presented any plausible Eleventh Amendment issue for review, this Court would not likely be able to enter any relief for Petitioners, in that the judgment below is independently supported by numerous defects in the Complaint.

First, to whatever extent Petitioners could pierce immunity, their claims would run into the wall of Article III standing, for their effort to have the State "reclaim" the Sailors' Home Society land is nothing but an effort of a citizen "to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution." *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973).

Second, the fact that the Attorney General acted as representative of the public in the *Sailors Home* litigation gives rise to an independent bar under *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), and 28 U.S.C. § 1738. *See Nevada v. United States*, 463 U.S. 110 (1983). The Attorney General, under state law, plainly had the power to act as "*parens patriae* of charitable trusts," *see Midkiff v. Kobayashi*, 54 Haw. 299, 336, 507 P.2d 724 (1973), and thus "the analogy of a faithless private fiduciary cannot be controlling for purposes of evaluating the authority of the [State of Hawaii] to represent differening interests." *Nevada*, 463 U.S. at 142.

Third, Petitioners have not properly alleged that any of the State Respondents in fact "caused" the loss of which they complain. Under the doctrine of intervening causation, which is fully applicable to 42 U.S.C. § 1983 suits, the responsibility, if any, for any "loss" of the Sailors' Home parcel lies with the independent judgment exercised by the Hawaii Attorney General and the State courts in the *Sailors Home* litigation. No judgment could therefore enter in *this* case against the particular state officials named in this litigation. *See, e.g., Smiddy v. Varney*, 665 F.2d 261 (9th Cir. 1981), *after remand*, 803 F.2d 1469 (9th Cir. 1986). Likewise, Petitioners have not shown

how *they* suffered any loss that could give rise to an Article III "controversy" or award of personal money damages.

Fourth, the action here, which is governed by Hawaii's two-year statute of limitations for personal injuries, *see* Haw. Rev. Stat. § 657-7 (1985), is plainly time-barred, coming at least eighteen years too late to review the injuries first inflicted by the *Sailors Home* judgments. *See generally United States v. Kubrick*, 444 U.S. 111, 125 (1979) (on limitations).

Fifth, Petitioners' own allegations virtually admit that § 5(f) was not breached. Certainly the possibility of reverter here is not "lands" as the plain meaning of that word is used in § 5(f) of the Admission Act, and, therefore, Hawaii had no less discretion to waste this asset than any other part of the public fisc. Moreover, § 5(f) turns ultimately on application of *state* law, once the minimal threshold of a "public use" is demonstrated. In this case, the Hawaii courts themselves determined that the land properly was vested in the Sailors' Home society pursuant to Hawaii's "doctrine of equitable approximation," *In re Estate of Chun Quan Yee Hop*, 52 Haw. 40, 46, 469 P.2d 183 (1970). Indeed, even if Hawaii now owned the full fee, under Haw. Rev. Stat. § 171-43.1, it would have the power to dispose of all but naked title to the Sailors' Home Society without the requirement of compensation to the public fisc.

Sixth, for the reasons stated by the Petition in No. 91-1238, 42 U.S.C. § 1983 does not afford a remedy here.

CONCLUSION

For the foregoing reasons, the writ in No. 91-1273 should be denied.

Dated: Honolulu, Hawaii, February 27, 1992.

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